APPENDIX A

PEERLESS TOOL AND ENGINEERING CO. and
MARLIN TAYLOR AND LOWELL HALL
DIE AND TOOL MAKERS LODGE NO. 113, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL and MARLIN TAYLOR and LOWELL HALL. Cases Nos. 13-CA-1661 and 13-CB-297.
March 7, 1955

Decision and Order[a]

1. The Section 8(b)(2) allegations of the complaint

We agree with the Trial Examiner's finding that the Union violated Sections 8(b)(2) and 8(b)(1)(A) of the Act by causing the Company to discharge employees Taylor, Hall, Salisbury, Pieha, and Bellendir for reasons other than their failure to tender periodic dues uniformly required as a condition of retaining membership in the Union.

As described in the Intermediate Report, the union constitution and rules provided that if a member became 3 months delinquent in the payment of dues, he was automatically dropped from membership. . . . Testimony credited by the Trial Examiner established that on September 28, 1953, before they would have become 3 months delinquent in their dues, Taylor and Hall went to the union office and made a personal tender of their dues for the previous months, which Business Agent Wilke refused to accept, stating that they could not pay their dues unless they also paid the assessment.[3] The Union contends that

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[a] Petitioner has not copied those portions of the Decision and Order relating to Peerless Tool and Engineering Company and findings as to form. They are contained in the record, pages 376-390. The *numbered* footnotes following are from the decision; this one was supplied by Petitioner.

[3] We do not adopt the Trial Examiner's statement that it had been a "long established practice" for the union stewards to collect dues at the plant, as the evidence relating to such a practice is inconclusive. This does not, however, affect our agreement with the Trial Examiner's ultimate conclusion. Like the Trial Exam-

even if this incident occurred, subsequent requests by Union Steward Brasfield that Taylor and Hall pay only their dues made it incumbent upon them to make further tender of dues, and that failure to do so make them legally subject to discharge. However, the record does not establish that such a request was made. According to Brasfield, his subsequent conversations with Taylor and Hall and other delinquent members were limited to statements that they were delinquent in their dues, and that if they were 3 months delinquent, they would be subject to discharge. This hardly constitutes an offer that the Union would accept dues without the condition which it previously attached. In the absence of such an offer being communicated to Taylor and Hall, they were not required to make recurring futile tender in the face of Wilke's explicit rejection on September 28.

We turn next to the facts relating to the alleged dues delinquencies of Salisbury, Picha, and Bellendir. The last month for which Salisbury paid his dues was March 1953. He made no tender of dues to the Union during the months of April, May, and June, 1953, and his membership automatically terminated at the end of June under the Union's 3-month rule. In September and November he indicated to Steward Brasfield that he would pay his dues but not the assessment. In the November conversation, Brasfield replied that Salisbury could not pay his dues without paying the assessment.

On June 22, 1953, Picha succeeded in paying his dues for the month of May at the Union office, after protesting that he was unable also to pay the assessment. At that time, he was informed by the union clerk who accepted his dues that "they [the Union] wouldn't take the next payment unless he paid the assessment." Picha subsequently

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iner, we find that the alleged "donation" was in fact treated as an assessment by the Union. Although it did not technically qualify as such, the Union itself so referred to it, and clearly considered it mandatory for the members to contribute.

heard from other employes that dues were being refused in this manner. He nade no tender of dues for the months of June, July, and August, and therefore, according to the union rules, his membership was terminated at the end of the month of August. He offered to pay Brasfield in November. Brasfeld replied merely that "It is out of my hands."

In May 1953, Bellendir paid his dues through the month of July. He testifiec that he was "pressured" to pay the assessment at that time, but that he was permitted to pay his dues only after he explained that he was unable to pay the assessment. On October 28, 1953, a few days before he would have become 3 months delinquent in his dues, and therefore no longer a member in good standing, Bellendir mailed the Union $4, the exact amount of his dues for August, together with his dues book. A few days later, he received in the mail a receipt for a $4 "donation," dated October 29, and his dues book without an August dues stamp. A few days after November 1, Bellendir spoke to Brasfield about the $4 being applied to the assessment, instead of to his dues. Brasfield told him he would have to go to the union office to have it changed. Bellendir asserts that he did not go to the union office because he knew that on the union records he was already 3 months in arrears and he hought it was too late for him to do anything about it.

The Trial Examiner found that each of the discharged employees made a ender of dues on at least one occasion, and tender was eitler refused by the Union, or the money was misapplied to the assessment, and subsequent tender was excused as futle because the Union had a policy that payment of the assessment was a condition precedent to the acceptance of dues payment. However, it is undisputed that, as relted above, Salisbury and Pieha made no tender of dues luring the 3 months following their last dues payment, whih was the time allotted for tender under the Union's autonatic termination of membership rule.

In determining whether the Union could thereafter legally cause their discharge, it is therefore necessary to determine whether their failure to make a tender during this period was excused.

We agree with the Trial Examiner's finding that the Union had a policy of refusing to accept dues unless the assessment for the strike fund was also paid. The existence of such a policy is shown by the statement by an employee of the Union to Pieha that his next dues payment would not be accepted unless he also paid the assessment; by Wilke's rejection of tenders of dues on September 28 by Taylor, Hall, and Cantrell, because the assessment was not paid; and by the statements of Union Steward Brasfield at the plant to employees Hall, Cantrell, Salisbury, and Pieha in September and November, that dues would not be accepted unless the assessment was paid. We also find that the misapplication of dues money mailed to the Union by Hoppe on August 26, and by Bellendir on October 28, as fully described in the Intermediate Report, resulted from the application of the above policy.[4]

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[4] The Trial Examiner found that although these misapplications were indicative of the Union's policy not to accept dues without the assessment, they appeared to be the result of errors. We do not adopt the latter conclusion, which is inconsistent with the finding that they were indicative of a policy, and also with the Trial Examiner's characterization of the Union's explanation of its handling of Hoppe's remittances as unconvincing. However, as there is no exception to the recommendation to dismiss the portion of the complaint relating to these incidents, we adopt this recommendation pro forma.

The Union excepts to the receipt in evidence of certain carbon copies of letters from Hoppe to the Union requesting that the misapplication of his dues money be corrected, on the ground that the best evidence rule requires the introduction of the original letters unless the General Counsel could not have secured the originals from the Union by subpena. The letters were admitted subject to substitution of the originals if the Union would consent to produce them. In these circumstances we find that the Respondent Union was not prejudiced by receipt of the copies in evidence.

This policy of the Union not to accept dues without payment of the assessment was in effect during at least a portion of the 3-month period ending June 30, 1953, in which Salisbury was otherwise required to tender his dues to avoid termination of his membership. The letter announcing the assessment for the strike fund was issued by the Union to the membership on May 18, 1953. By June 22, 1953, the fact that the Union would not accept dues unless accompanied by payment of the assessment was openly expressed by a union clerk charged with the acceptance of dues from the members. That this statement was in fact an accurate statement of the Union's policy in this respect, is borne out by the subsequent application of the policy in Wilke's refusal to accept the dues of employees, and by its reiteration on several occasions by Union Steward Brasfield. The substance of the union policy is the controlling factor in determining whether tender would have been futile. Because of the existence of the union policy during the latter portion of the period during which Salisbury could have made a timely tender of dues, we are convinced that such a tender by him in fact became a futile gesture before his grace period expired. As regards Pieha, we find that tender of his dues during the months of July and August would have been futile in view of the prior statement to him that his next dues payment would not be accepted unless accompanied by the assessment, and the fact that this was indeed the union policy during this period.

As previously indicated, Bellendir's last tender of dues was in fact timely with respect to the Union's automatic suspension rule, but the money was misapplied by crediting it to the assessment. The Union contends that it was incumbent on Bellendir to have the misapplication rectified, and to continue to tender his dues thereafter. We find that the misapplication was in fact an indication of the futility of tender which indeed existed under the Union's policy not to accept dues unless the assessment was paid,

and therefore Ballendir was not required to make further tender. In the circumstances related, the failure of Salisbury, Pieha, and Bellendir to tender dues during their respective 3-month grace periods is immaterial.[5]

2. The Section 8(b)(1)(A allegations of the complaint

The Trial Examiner found that the Union violated Section 8(b)(1)(A) of the Act by threatening that it would not process grievances for employees who failed to pay an assessment to the union strike fund. We find in agreement with the Trial Examiner and contrary to the Union's contentions, that the threats were made on the occasions found by the Trial Examiner.[6] The Union also contends that even if the threats were made, threats of this nature do not constitute a violation of Section 8(b)(1)(A) because they are not coercive of employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 of the Act guarantees to employees the right to engage in union activities, and also the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment by the tender of periodic dues and initiation fees uniformly required, as authorized in Section 8(a)(3) of the Act. The Board has previously noted that denial to employees of so valuable a facility as the Union's assistance in prosecuting

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[5] *Eclipse Lumber Co. Inc.*, 5 NLRB 464, 467, enfd. 199 F. 2d 684 (C. A. 9); *Westinghouse Electric Corporation*, 96 NLRB 522, enfd. 203 F. 2d 173 (C. A. 9)

[6] As we find that the record supports the Trial Examiner's factual finding that Union Steward Chmielak made the threats in question after September 1, 153, and continued to reiterate them at least during October and November 1953, and therefore within the Section 10(b) period, we find this Section 8(b)(1)(A) allegation was not barred by Section 10(b), as contended by the Respondent Union.

grievances is a grave matter,[7] and clearly therefore, a threat to do so is coercive in nature.

It is true, as the Union contends, that an employee who is a union member and who refuses to comply with requirements of the union to perform additional obligations or activities is not immune from all forms of compulsion by the union. Under the proviso to Section 8(b)(1)(A) which reserves to labor organizations the right to prescribe rules regarding membership, sanctions such as fines,[8] or even expulsion from union membership[9] may be imposed to secure compliance with a union's rules and requirements, for although these measures are in fact coercive, they are permissible under the proviso as matters confined to internal union administration. However, a threat not to represent an employee in the processing of his grievances is clearly not limited to internal union administration. The union enjoys its position as exclusive representative of the employees by virtue of Section 9(a) of the Act, which provides in part that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

The Board has held that an organization which is granted exclusive bargaining rights under Section 9 has, in return, assumed the responsibility to act as a genuine representative of all the employees in the bargaining unit, and, more specifically, that Section 9(a) gives rise to a duty by such a labor organization impartially and with-

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[7] *Hughes Tool Company*, 104 NLRB 318, pp. 326-328. threat to do so is coercive in nature.

[8] *Minneapolis Star and Tribune Company*, 109 NLRB 727.

[9] *International Typographical Union, et al.* (American Newspaper Publishers Assn.), 86 NLRB 951.

out discrimination to accept and process all grievances on which its aid is requested by the employees it represents.[10] This duty of the bargaining representative to the employees and the corresponding right of the employees to have this bargaining representative undertake to perform the duty arise from the fact that the employees are in the bargaining unit, irrespective of union membership or the existence of a union-security contract. We find, in agreement with the Trial Examiner, that the threats to discriminate in the performance of this duty, which the Union made here for the purpose of coercing employees to contribute to its strike fund, are threats of reprisal prohibited by Section 8(b)(1)(A) of the Act.

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[10] *See Hughes Tool Company, supra,* at p. 325.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT.

March 6, 1956.

No. 11566.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

DIE AND TOOL MAKERS LODGE NO. 113,
INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

and

PEERLESS TOOL AND ENGINEERING COMPANY, *Respondents.*[b]

Rehearing Denied April 19, 1956.

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

This case is here on the National Labor Relations Board's petition to enforce its order issued against both respondents.

Respondent Die and Toolmakers Lodge 113, International Association of Machinists, A.F.L., is the sole bargaining representative for the employees of respondent Peerless Tool and Engineering Company. Section 2 of Article I of the collective bargaining agreement in effect between the Company and the Union provides that all employees who were on the date of the execution of the contract members of the Union shall remain members of the Union as a condition of employment and that all new employees shall within thirty-one days become and then

[b] Petitioner has not copied those portions of the opinion relating to the Company. They are contained in 231 F. 2d 298, pages 302-304.

remain members of the Union as a condition of employment. A rule of the Union provides that any member who fails to pay his dues for a period of three months automatically loses his membership.

Early in 1953 the Union sent the following letter to all of its members:

"Dear Sir and Brother:

"There will be a voluntary donation to support our striking Brothers in the following amounts:

"$10.00 weekly for those Journeyman working in shops with $2.73 contracts.

"5.00 weekly for all others.

"The first of such assessments is due May 22, 1953.

"You will receive a receipt for your donation and the amount will be recorded on the assessment pages of your dues book.

"This assessment will run as long as it is necessary to win our fight.

"Fraternally yours,

"Die & Tool Makers Lodge
"No. 113 I. A. of M.
"D. W. McDole
"Financial Secretary"

Even though the employees of Peerless Tool and Engineering Company were not on strike, they were required to contribute their weekly "donations" to the Union's strike fund.

In February of 1954 the Company notified the Union that it was going to have to lay off several employees and, pursuant to the collective bargaining agreement, listed those who were lowest in seniority as the men to be discharged. Thereupon the Union furnished the Company with a list of

seven employees who were more than three months delinquent in their dues and requested that the Company discharge these named employees rather than lay off Union members in good standing who had less seniority. The Company then discharged five of the seven men named by the Union.

Two of the men discharged filed a charge with the Board claiming that the Union refused to accept their dues because they would not pay the "donation," and that the Company knew this when it fired them. The General Counsel of the Board filed a consolidated complaint accusing both the Union and the Company of unfair labor practices.

In its decision and order the Board concluded that the Union had violated Sections 8(b)(2) and 8(b)(1)(A) of the Labor Management Relations Act, 29 U.S.C.A. § 158 (b)(2) and 158 (b)(1)(A), by causing the Company to discharge the five named employees for reasons other than failure to tender union dues; and that the Union had further violated Section 8(b)(1)(A) by threatening that it would not process grievances for employees who refused to pay the "donation." The Board found that the Company had violated Sections 8(a)(3) and (1), 29 U.S.C.A. § 158(a) (3) and (1), by discriminating in regard to tenure of employment of five named employees. In this enforcement proceeding each respondent has vigorously contested the portion of the decision and order that is directed against it.

The Union.

The Section 8(b)(2) Violation.

The Union admits that it violated Section 8(b)(2) if it refused a valid tender of dues thereby causing an employee's discharge for reasons other than nonpayment of dues. The Board argues that this is exactly what the Union did, so the principal question on review is the existence of substantial evidence to support the Board's findings.

In its decision and order the Board stated:

> "The Trial Examiner found that each of the discharged employees made a tender of dues on at least one occasion, and that tender was either refused by the Union, or the money was misapplied to the assessment, and subsequent tender was excused as futile because the Union had a policy that payment of the assessment was a condition precedent to the acceptance of dues payments."

The Union denies that the evidence shows a Union policy of conditioning the acceptance of dues upon payment of the "donation," and argues that the discharged employees had a duty to tender their dues each time they became due even if those for the previous month had been refused.

The first man to testify was Hall, one of the charging parties. He stated on direct examination that, with Taylor and Cantrell, he had gone to the Union office to pay his dues and had been refused. All three men had the amount of money they owed in their hands, but the Union officials refused to take it. Mr. Wilke, business representative of the Union, told them that the Union would not accept their dues until they paid the "assessment." Although Hall, Taylor and Cantrell were all excluded from the hearing room except when they themselves were testifying, they all gave substantially the same account of this occurrence. Wilke denied telling them that they would have to pay the "assessment" before their dues would be accepted, but the hearing examiner credited the three employees and the Board accepted his finding. There is substantial evidence in the record to support this finding.

The Union did not actually refuse to accept dues from the other three men named in the complaint as it had from Hall, Taylor and Cantrell. However, these three men (Salisbury, Pieha and Bellendir) met with resistance in the form of misapplication and delay, and were told that dues would not be accepted unless the assessment was paid.

Edward Salisbury testified that he sent ten dollars and his dues book to the Union office, and that his book was returned to him without credit for paying his dues. When Salisbury asked a Union steward about this, he was told that he would have to pay the assessment. When the steward told Salisbury that he was behind in his dues, Salisbury offered to pay his dues but said he would not pay the assessment. The steward told him that he could not pay his dues until he "straightened out the assessment along with it."

Joseph Pieha told the examiner that the people in charge of the Union office would not accept his dues without the "donation" until he told them that he had been sick for several weeks and was unable to pay it at that time. But he was told that the next time he paid his dues he would have to pay the assessment. Pieha also testified that he knew of other employees in his department, not involved in this proceeding, who were not able to pay their dues until they had paid the assessment. He did not attempt to pay his dues again.

James Bellendir is in much the same position as Pieha. Bellendir, too, testified that he was not allowed to pay his dues without the assessment until he told the Union officials that his wife had just returned from the hospital. The next time he tried to pay his dues the money was applied to the strike fund and he received no credit in his due book. Bellendir made no further attempt to pay his dues.

The trial examiner and the Board concluded from the evidence that it was the Union's policy not to accept dues until the required "donation" had been paid. They held that in the face of this policy plus the resistance to and, in some instances, outright rejection of tender, these men were not required to continue their attempts to force the Union to accept their dues.

(1) There is sufficient evidence in the record to support the Board's finding that it would have been useless for

these employees to continue attempting to pay their Union dues without first paying the "donation." They could reasonably have concluded that further tenders would also have been refused.

(2) The law is clearly against the Union's contention that these employees were obligated to continue tendering each month's dues as they became payable even though their last tender had been refused. N. L. R. B. v. International Ass'n of Machinists, Local No. 504, 9 Cir., 203 F. 2d 173, is a case much like the one before us. In that case an employee fell into disfavor with the respondent union because he organized and promoted a rival union. The respondent union fined him $500 and terminated his membership until the fine was paid. The employee refused to pay the fine. Shortly after this, the respondent union entered into a union shop agreement with the employer and asked that the employee be discharged because he had failed to pay his dues. In enforcing an unfair labor practice decree against the union, the Ninth Circuit held that the employee did not have to continue offering to pay his dues because he had been told by the steward that they would not be accepted. The court also gave weight to the fact that the employee had heard the steward say to another employee in the same circumstances, " 'You know I can't take dues from you guys.' " 203 F. 2d at page 175.

The present case is even stronger because two of the discharged employees actually went to the Union office with their dues money in their hands and were turned away, and because the Union's policy was demonstrated by many more incidents. The law does not require the performance of useless acts. The petitioner also cites several insurance cases in which it has been held that tender of premiums need not be made where it is reasonably certain that they will be refused. Taylor v. Mutual Ben. Health & Accident Ass'n, 8 Cir., 133 F. 2d 279; Shaner v. West Coast Life Ins. Co., 10 Cir., 73 F. 2d 681. The Board was justified in finding that it was reasonably certain that any tender of

dues from the five employees discussed above would have been refused.

The Section 8(b)(1)(A) Violation.

(3) The Board approved the hearing examiner's findings in concluding that the Union had tried to coerce the employees named in the complaint in the exercise of their rights under Section 7 of the Act. The coercive statements cited by the Board were those made by Union Steward Chmeilak to the effect that the Union would not prosecute grievances for employees who did not pay the assessment. There is evidence in the record to support the finding that Chmeilak actually did make these statements.

At page 112 of the Joint Appendix George Cantrell testified as follows:

> "Q. Would it be Tony Chmeilak? A. That is right.
> "Q. What did he say at that meeting? A. He said the ones that didn't pay the assessment, if they brought a grievance to him that he would tear it up and throw it in the garbage can."

At pages 139-140 of the Joint Appendix Andrew Barnes, an employee of Peerless and a Union member, testified:

> "A. The main thing I noticed he [Chmeilak] said, he said that if we didn't pay this assessment, not to bring any grievance, because if we did he would tear the grievance up and throw it in our face.
> "Q. Did Wilke [Union Business Representative] say anything at that meeting? A. Well, yes, he had quite a bit to say, but the main thing he said—he sat around the table like this, and he walked around the table, and as he walked around the table, he said, 'Well, this here assessment is voluntary. You don't have to pay it if you don't want to, but if you don't pay it, don't come to the union for anything because you most certainly will not get it'."

At page 177 of the Joint Appendix Charles Cerminn testified about Chmeilak:

> "A. He said they wouldn't look into any of my grievances unless I could show my book showing that I had a paid-up membership."

And again at page 191 Cerminn said:

> "A. There wasn't nothing said about not paying the assessment and taking up grievances. The only time the subject was discussed with Chmeilak was when we were told that he would not represent the men in the grievances if they didn't have their assessments paid."

(4) Chmeilak denied having made these statements, but the hearing examiner credited the employees and the Board accepted his finding. Of course, we cannot review these administrative determinations on the credibility of witnesses.

(5) All of these statements except the last two, which were related by Charles Cerminn, occurred before October 15, 1953, and cannot, therefore, be cited as unfair labor practices because they were made more than six months before the charge in which they were alleged. 29 U.S.C.A. § 160(b). They do, however, lend credibility to Cerminn's testimony relating threats by Chmeilak which the examiner and the Board found were made within the statutory period.

Cerminn was never very clear about just when the meeting took place at which he heard Chmeilak say that he would not prosecute grievances for those who did not pay the assessment. On direct examination Cerminn said that it was in the fall of 1953, but that he talked to Chmeilak about the assessment almost every day. Although he specifically said that it could have been in September, October or November, he later stated that he attended the meeting "much later" than writing a check to the Union which was dated September 14, 1953. At another point in his testimony

Cerminn described he meeting as being in the "late fall." We feel that these statements, plus the fact that Cerminn and Chmeilak were constantly discussing this subject throughout the latter part of 1953 and the first part of 1954, furnished sufficient evidence to support the Board's finding that Chmeilak made at least one of these threats after October 15, 1953.

Such a threat is violative of Section 8(b)(1)(A) of the Act, 29 U.S.C.A. §158(b)(1)(A), because, in the terms of the statute, it tends " * * * to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *." Section 7 gives employees the right to engage in concerted activities for their mutual aid or protection, and the right to refrain from such activities. The employees of Peerless, therefore, had the right to refrain from paying the "donation." Threatening to stop processing grievances for employees who did not pay the proper "donation" was coercive within the meaning of Section 8(b)(1)(A). It was not simply internal administration of Union affairs because as the certified bargaining representative, the Union is required by the Act to represent and bargain for *all* of the employees in the plant. Ford Motor Co. v. Huffman, 345 U.S. 330, 337, 73 S. Ct. 681, 686, 97 L. Ed. 1048, where the Court said that the unions' "statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any."

Following the recommendation of the Trial Examiner, the Board ordered the Union and the Company to cease and desist from the unfair labor practices, ordered the Company to notify the five men in writing that Union had withdrawn its objections to their employment and requested their immediate and full reinstatement, and ordered the Union and the Company jointly and severally to make whole each of the five employees for any loss of pay suffered by reason of the discrimination. Neither the Union

nor the Company makes any complaint in this court of that provision of the Board's order which requires that the discharged employees be made whole by the Union and the Company jointly and severally. Each, instead, is complaining only that the evidence was not sufficient to sustain the Board's finding of unfair labor practices as charged.

Since we have shown above that the evidence was sufficient, the order of the Board must be enforced. It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Filed May 9, 1956 Kenneth J. Carrick Clerk

No. 11566

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

DIE AND TOOLMAKERS LODGE No. 113, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL; and PEERLESS TOOL AND ENGINEERING CO., *Respondents*.

Decree Enforcing an Order of the National Labor Relations Board

Before: MAJOR, LINDLEY and SWAIM, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 7, 1955. The Court heard argument of respective counsel on January 26, 1956, and has considered the brief and the transcript of record filed in this cause. On March 6, 1956, the Court, being fully advised in the premises handed down its decision enforcing the said order. In conformity therewith it is hereby

ORDERED, ADJUDGED AND DECREED that:

I. The Respondent, Die and Toolmakers Lodge No. 113, International Association of Machinists, AFL, Chicago, Illinois, (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Peerless Tool and Engineering Co., its officers, agents, successors, and assigns, to discharge or in any other manner to discriminate against its employees with respect to whom membership in the Respondent Union has been denied or terminated upon some ground other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership or to discharge or in any other manner to discriminate against its employees in violation of Section 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter called the Act).

(b) Restraining or coercing employees of Peerless Tool and Engineering Co., its officers, agents, successors, and assigns, in the exercise of their right to engage in or to refrain from engaging in any and all of the concerted activities guaranteed to them by Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(a) Notify Peerless Tool and Engineering Co. in writing that it withdraws its objections to the employment of Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury, and James Bellendir, and requests it to offer them immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Notify Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury, and James Bellendir in writing that it had advised Peerless Tool and Engineering Co. that it withdraws its objections to their employment and requests it to offer them immediate and full reinstatement.

(c) Make whole Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury, and James Bellendir for any loss of pay they may have suffered as a result of the discrimination against them in the manner set forth in the section of the Intermediate Report of the Trial Examiner of the National Labor Relations Board dated August 25, 1954, entitled "The Remedy."

(d) Post in conspicuous places in its business office at Chicago, Illinois, where notices are customarily posted, copies of the notice attached hereto marked "Appendix A". Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region of the National Labor Relations Board, Chicago, Illinois, shall, after being duly signed by the Respondent Union's official representative, be posted by it immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material.

(e) Mail to the aforesaid Regional Director signed copies of the notice attached hereto and marked "Appendix A" for posting, the Employer willing, at its plant in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the said Regional Director, shall, after being signed by the Respondent Union's official representatives, be forthwith returned to the Regional Director for said posting.

(f) Notify the aforesaid Regional Director in writing within ten (10) days from the date of this Decree what steps it has taken to comply herewith.

J. Earl Major
Judge, United States Court of Appeals for Seventh Circuit

Walter C. Lindley
Judge, United States Court of Appeals for the Seventh Circuit

H. Nathan Swaim
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:

Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit
(Seal)

Dated: May 9, 1956

APPENDIX A

Notice to All Members of Die and Tool Makers Lodge No. 113, International Association of Machinists, AFL

Pursuant to a Decree of the United States Court of Appeals, enforcing an Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

WE WILL NOT cause or attempt to cause Peerless Tool and Engineering Co. or any other employer to discriminate in any manner against employees in violation of Section 8 (a) (3).

WE WILL accept the payment of dues from members without requiring that they also pay a donation to the strike fund.

WE WILL NOT in any manner restrain or coerce employees of the above-named or any other employer in the exercise of rights under Section 7 of the Act.

WE WILL make Lowell Hall, Marlin Taylor, Joseph Pieha, Edward Salisbury and James Bellendir whole for the discrimination caused against them.

WE HAVE withdrawn our request for the discharge of the aforementioned individuals and have notified Peerless Tool and Engineering Co. that we have no objection their reemployment.

DIE AND TOOL MAKERS LODGE NO. 113, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

.....
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced or covered by any other material.

APPENDIX C

Statutes Involved

Administrative Procedures Act

5 USCA 1001 et seq.

5 USCA 1009(e)—Scope of Review

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. Act of June 11, 1946, C. 324 § 10, 60 Stat. 243.

Judicial Code

28 USCA 1 et seq.

28 USCA 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . Act of June 25, 1948, C. 646, 62 Stat. 928.

National Labor Relations Act

29 USCA 151 et seq.

29 USCA 158—Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159(f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify an discrimination against an employee for non-membership in a labor organization (A) if he has rea-

sonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. (Act of July, 1935, c. 372, § 8, 49 Stat. 452; as amended June, 1947, c. 120, Title I, § 101, 61 Stat. 140; October 22, 1951, c. 534, § 1(b), 65 Stat. 601).

158—Unfair Labor Practices

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce

(A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. (Act June 23, 1947, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601).

29 USCA 160—Prevention of Unfair Labor Practices—Powers of Board Generally

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the

Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon . . .

(c) Reduction of testimony to writing; findings and orders of Board.

. . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the per-

son named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit of district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure

or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28. (Act June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 648, § 32, 62 Stat. 991).

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 191

DIE AND TOOLMAKERS LODGE 113, INTERNATIONAL ASSOCIATION OF MACHINISTS (AFL-CIO), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 9a-18a) is reported at 231 F. 2d 298. The findings of fact, conclusions of law, and order of the Board (J. A. 339-390)[1] are reported at 111 NLRB 853.

JURISDICTION

The decree of the court below was entered on May 9, 1956 (Pet. App. 18a-22a). The petition for a writ of

[1] "J.A." refers to the Joint Appendix filed in the court below.

certiorari was filed on June 22, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Petitioner union, after refusing to accept dues from employees who failed to pay a strike assessment, obtained the discharge of several such employees under a union-security agreement for nonpayment of dues. The first question presented is whether the employees were required to make a futile tender of dues in order to retain their statutory protection against discharge for nonpayment.

2. Whether substantial evidence supports the finding of the Board, sustained by the court below, that petitioner's admitted acts of unlawful restraint and coercion were committed within six months preceding the filing of the charge.

STATUTE INVOLVED

Section 7 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

The other relevant statutory provisions are set forth in the Petition, 23a-28a.

STATEMENT

I. The Board's Findings of Fact

Briefly, the Board found that petitioner, herein sometimes referred to as the Union, violated Section 8 (b) (2) and (1) (A) of the Act by causing Peerless Tool and Engineering Company, herein called the Company, to discharge five employees for alleged dues delinquencies which occurred solely because petitioner refused to accept the employees' tender of dues unless they also contributed to its strike fund.[2] The Board also found that petitioner had further violated Section 8 (b) (1) (A) by its threat not to process grievances for employee-members who failed to contribute to its strike fund.

A. *Petitioner levies a strike fund assessment, and threatens employees who refuse to pay*

In the spring of 1953, as the result of strikes against several employers not including the Company, petitioner in an effort to replenish its strike-fund levied an assessment of $5 to $10 per week on each member (J. A. 344; 244, 262, 264, 289, 335-336). In June 1953, in explaining the assessment to the union members employed by the Company, petitioner's shop steward Chmeilak stated that those who did not pay the assessment need not bring any grievances to him because if they did "he would tear it up and throw it in the garbage can" (J. A. 345; 86, 111-112, 222-223, 290). At the same

[2] Petitioner on this review appears to concede the validity of the Board's determination with respect to two employees. Pet. 3, n. 2.

meeting Business Agent Wilke stated that the assessment was "voluntary," but "if you don't pay it, don't come to the Union for anything because you most certainly will not get it" (J. A. 345; 139-140). Both Chmeilak and Wilke in addressing the employees called to their attention the fact that, if they became three months' delinquent in the payment of their dues, they would automatically be dropped from membership under the Union's constitution, and that under the union shop agreement with the Company, such employees would be subject to discharge at petitioner's request (J. A. 345; 213-214, 245-246, 253, 26, 28, 42).

As appears more fully below, petitioner sought to compel payments to the strike fund by refusing to accept dues from employees who were "delinquent" with respect to the assessment. Thereafter, in October and November 1953, shop steward Chmeilak reiterated his earlier threat to coerce the employees into paying the assessment (J. A. 346-347; 177, 190-191). On one occasion Chmeilak stated to employee Cerminn that the Union would not process grievances for members who refused to contribute to the strike fund, and on another occasion, Chmeilak said that he would only process grievances for members who had Union dues books showing a paid-up membership (J. A. 346-347; 177, 190-191).

B. *Petitioner refuses to accept dues from employees who have not paid the assessment, and applies to the assessment payments intended for dues*

1. Hall, Taylor and Cantrell

In September 1953 employees Lowell Hall, Marlin Taylor, and George Cantrell, who were opposed to the

strike fund assessment and had made no payments to it, visited the Union office together to make dues payments (J. A. 377, 348-349; 87-89, 97, 101-102, 106-107, 113-115). When the three men tendered their books and dues to the Union cashier, she noted that none of them had paid the assessment and called Business Agent Wilke (J. A. 348; 88-89, 102, 114-115). When the men indicated to Wilke that they would not pay the assessment, he replied that he was sorry but they could not pay their dues unless they did so (J. A. 377, 349; 89-90, 102-103, 115-116). Wilke further stated that if an employee did not pay the assessment he would be forced out of the Union and lose his job (J. A. 349; 90). When Taylor expressly asked Wilke if he was refusing to accept their tender of dues, Wilke acknowledged that he was (J. A. 349; 103). Later that day Union Steward Brasfield told them they "might just as well pay it. There is no way around it or out of it" (J. A. 349; 90-91, 116-117). At a later date Brasfield again affirmed to Hall that the Union "will not take your dues until you pay [the assessment]" (J. A. 349; 91). Taylor, Hall, and Cantrell made no further tender of dues prior to the time the three month grace period afforded them under the Union's constitution expired or before the demand for their discharge made by the Union several months later (J. A. 351; 87, 107, 113).

2. Pieha

When employee Joseph Pieha visited the Union office on June 22 to pay his membership dues for May, the Union cashier took the money proffered by Pieha and started to credit it as his contribution to the strike fund which Pieha had not paid (J. A. 378-352; 154, 158).

Pieha thereupon protested that he had been ill for a few weeks (J. A. 378, 352; 154, 158). The cashier, after consulting with some third person in the Union office about the matter, thereafter noted in Pieha's dues book that he would be excused from paying the assessment for the period of his illness, and accepted the proffered money as Pieha's dues payment for May 1953 (J. A. 378, 352; 154-155, 158, 276, 79). At this time, however, the cashier told Pieha that the Union would not accept any more dues unless the assessments were paid (J. A. 378, 352; 155, 158). Because of this announced Union policy, and because of other incidents apparently resulting from such a policy which were told to him, Pieha made no tender of dues to the Union for the months of June, July, and August, and according to the Union's rules his membership terminated at the end of August 1953 (J. A. 378-379; 155, 158-159, 160).

3. Bellendir

In May 1953, when James Bellendir, an employee of the Company and member of the Union, attempted to pay two months' dues, the Union cashier, noting from Bellendir's dues book that no payment had been made to the strike fund, attempted to "pressure" Bellendir into making such a payment (J. A. 353; 161). When Bellendir complained that his wife had recently been hospitalized, the cashier, after discussing Bellendir's case with an unidentified person in the office, accepted Bellendir's proffered dues payments, and stamped his dues book as paid (J. A. 353; 161-162).

In the latter part of October Bellendir mailed the Union his dues book, together with a money order for $4.00, the exact amount of his dues for August 1953 (J. A. 379, 353; 276, 162-163, 168). A few days later

his Union dues book was returned to him without an August dues stamp but containing a notation in the assessment section that four $5 assessments had been levied against him on May 22, 29, June 5 and 12, 1953, together with a credit of $4 on the first of these assessments, which was marked as paid on October 29, 1953 (J. A. 379, 353; 163-164, 44). Also enclosed was a receipt dated October 29, 1953, showing a $4 payment to the Union and credited to "donation" (J. A. 379, 353; 163, 44). On the receipt were notations: "4 wks. at $5 per week" and "bal. of $16 due yet" (J. A. 353; G. C. Ex. 9). Early in the month of November, when Bellendir spoke to Steward Brasfield about the application of this $4 payment to the assessment, instead of to his dues as he had intended, Brasfield told him that he would have to go down to the Union office to have it changed (J. A. 379, 353-354; 164, 166).[3] Bellendir, however, did nothing further in the matter for the reason that he knew that on the Union records he was already three months in arrears and he thought it was too late for him to do anything about it (J. A. 379, 354; 164, 166).

4. Salisbury

During the fall of 1953, Steward Brasfield also advised employee Edward C. Salisbury that the Union would not accept dues from employees who failed to make the required payments to the strike fund (J. A. 378, 351; 148-150). In September 1953, when Steward Brasfield inquired of Salisbury about his delinquent dues, Salisbury stated that he would pay his dues but

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would not pay the assessment (J. A. 378, 351; 148-149). Brasfield then replied that the assessment would have to be paid (J. A. 351; 149). Salisbury told Brasfield that if he was unable to pay his dues without the assessment he would not pay his dues (J. A. 351; 149, 144). In a later conversation between Brasfield and Salisbury in November 1953, Salisbury again stated that he would be glad to pay his dues but would not pay the assessment (J. A. 378, 351; 149-150). Brasfield at that time replied that Salisbury could not pay his dues unless he straightened out the assessment along with his dues (J. A. 378, 351; 150). Salisbury made no further effort to pay his Union dues (J. A. 351; 149-150).

C. *The Union compels the discharge of employees who have not paid the assessment*

On February 5, 1954, the Company notified the Union that it intended to lay off certain named employees (J. A. 342; 304-305, 92). Three days later the Union wrote the Company requesting the discharge of the employees discussed above for the asserted reason that they were delinquent in their dues (J. A. 342-343; 83, 304-305, 313-314, 40).

At the end of the work day on February 10, the Company terminated the employment of all the employees whose discharge had been demanded by the Union, except Cantrell (J. A. 359; 92-93, 119, 150, 156, 164-165, 307). Shortly after informing the employees of their impending discharge on February 8, the Company's personnel director told Cantrell that the Union had agreed to let him stay in the job because he was the only man on the night shift experienced at the special job he was then doing at the plant, and that he should get "straightened out" with the Union (J. A. 359; 119,

133-135, 310). Accordingly, Cantrell visited the Union hall that same week to pay his dues and there spoke with some unidentified person who indicated to him that the Union still would not accept his dues unless his strike-fund assessment was paid (J. A. 359; 120). Some days later when Cantrell again attempted to pay his dues, and offered to make weekly payments on the assessment, the Union's financial secretary told him, "No, pay the assessment and pay your dues as well as you can. I won't be hard on you." Cantrell then assented to the application of his $15 payment to the assessment and was not discharged (J. A. 359, 360; 119-120, 122, 330-331).

II. The Board's Conclusions of Law and Order

On the basis of the foregoing facts the Board found (1) that the Union had refused the timely tender of dues by Taylor and Hall because they had not paid the strike-fund assessment, and (2) that because the Union required the payment of the strike-fund assessment as a condition precedent to the acceptance of dues, Pieha, Salisbury, and Bellendir, all of whom refused to pay the assessment, were excused from the futile act of tendering dues. The Board concluded that the Union, by causing the Company to discharge these employees, had violated Section 8 (b) (2) and (1) (A) of the Act.[4] The Board further found that the Union had restrained and coerced the employees of the Company in violation of Section 8 (b) (1) (A) of the Act by its threat not to process grievances for employees who did not pay the strike-fund assessment (J. A. 377-384).

[4] The Board further found that the Company had unlawfully discharged the employees in violation of Section 8 (a) (3) and (1) and entered an appropriate order against the Company (J.A. 384-385, 388-390, 368-369). The Company has not sought review of this aspect of the case.

The Board's order (J. A. 385-390) requires the Union to cease and desist from causing the Company to discharge or otherwise discriminate against its employees in violation of Section 8 (a) (3) of the Act, and from restraining and coercing the Company's employees in the exercise of the rights guaranteed them under Section 7 of the Act.

Affirmatively the Board's order directs the Union (1) to notify the Company that the Union withdraws its objection to the employment of the five discharged employees, and requests their immediate reinstatement; (2) to notify the five employees that it has taken this action; (3) jointly and severally with the Company to make the employees whole for any loss they may have suffered because of the discrimination against them; and (4) to post appropriate notices (J. A. 386-388, 368-369).

III. The Decision of the Court Below

The court below, upon reviewing the evidence, sustained the Board's finding that "it would have been useless for these employees to continue attempting to pay their Union dues without first paying the 'donation.' They could reasonably have concluded that further tenders would also have been refused" (Pet. App. 13a-14a). Accordingly, the court below sustained the conclusion of the Board that the Union had caused the discharge of the employees "for reasons other than nonpayment of dues" (Pet. App. 11a, 14a). The court further sustained the Board's finding that sometime after October 15, 1953,[5] petitioner acting through shop steward Chmeilak violated Section 8 (b) (1) (A) by

[5] The charge was filed April 15, 1954; accordingly, violations of the Act committed prior to October 15, 1953, are barred by the limitations proviso of Section 10 (b).

threatening not to represent an employee in a grievance matter if he had not paid his strike assessment (Pet. App. 16a-17a). The court below accordingly enforced the order of the Board (Pet. App. 18a).

ARGUMENT

1. Under Section 8 (a) (3) and 8 (b) (2) an employee, even when subject to a union security agreement, is protected against discharge for loss of union membership if such loss of membership is not occasioned by a failure to tender dues (Pet. App. 25a.)[6] The holding of the court below that the same statutory protection extends to employees whose tender of dues would have been futile, because "the law does not require the performance of useless acts" (Pet. App. 14a), is manifestly correct, accords with the holdings of other courts of appeals,[7] and presents no question warranting review. Petitioner apparently no longer challenges the sufficiency of the evidence in support of the Board's finding that tender of dues without payment of the

[6] Petitioner does not challenge the Board's settled rule that a special strike assessment is not "dues," so that employees cannot be discharged for failure to pay such an assessment. *International Harvester Co.*, 95 NLRB 730, 732-733; *Lever Bros.*, 97 NLRB 1240; *Continental Can Co.*, 98 NLRB 1252; *National Malleable and Steel Castings Co.*, 99 NLRB 737; *John Deere Planter Works of Deere and Co.*, 107 NLRB 1497.

[7] *National Labor Relations Board* v. *International Association of Machinists*, 203 F. 2d 173, 176 (C.A. 9); *National Labor Relations Board* v. *Murphy's Motor Freight*, 231 F. 2d 654 (C.A. 3); see also *Hills* v. *Exchange Bank*, 105 U.S. 319, 321; *Taylor* v. *Mutual Ben. Assn.*, 133 F. 2d 279, 282-283 (C.A. 8); *Shaner* v. *West Coast Life Ins. Co.*, 73 F. 2d 681, 684-685 (C.A. 10). Petitioner's claim of conflict between the ruling below and *National Labor Relations Board* v. *Department Store Union*, 216 F. 2d 285 (C.A. 2) is insubstantial. The Second Circuit in the cited case expressly recognized that an employee is not required to make a useless tender of dues but found that the record in that case did not support a finding that such a tender would have been futile, 216 F. 2d, at 288, n. 1.

assessment would have been futile; the evidence (*supra*, pp. 4-8) fully supports the finding, and in any event the issue of fact thus posed would not warrant review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503.

2. Apparently conceding that it violated Section 8 (b) (1) (A) by threatening not to represent in grievances employees who withheld the assessment, petitioner argues (Pet. 14-15) that this threat was not repeated within six months of the filing of the charge, and that the threat uttered within that period was "an entirely different one"—namely not to represent employees who did not have a paid-up dues status. The two allegedly "different" threats were in fact identical, as failure to pay the assessment prevented an employee from having a paid-up dues book. The court below with ample evidentiary support sustained the Board's finding that at least one such threat was made within the six-month period (Pet. App. 16a), and the question thus has no significance beyond the facts of this case. *General Pictures Co.* v. *Western Electric Co.*, 304 U. S. 175, 178.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully,

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